



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

June 29, 2004

Steve R. Meheen
Project Manager
BHP Billiton LNG International Inc.
300 Esplanade Drive, Suite 1800
Oxnard, California 93036

Re: Air Permit Application for Cabrillo Port
BHP Billiton Deepwater Port Project Off Shore Ventura, California

Dear Mr. Meheen:

We received the letter from Hollister & Brace dated June 1, 2004, and written on behalf of BHP Billiton LNG International Inc. ("BHP"). Thank you for this response to our April 5, 2004, letter regarding the applicability of the federally-approved Ventura Air Pollution Control District ("District") rules to the proposed deepwater port. We have considered the arguments made concerning the Outer Continental Shelf Lands Act of 1953, 43 U. S. C. § 1331 *et seq.*, ("OCSLA"), the Deepwater Port Act of 1974, as amended, 33 U.S.C. 1501 *et seq.* ("DPA"), and the Clean Air Act, 44 U. S. C. § 7401, *et seq.*, ("CAA"). Our position regarding the applicability of the District rules has not changed, but we are clarifying in this letter our applicability determination and the remaining unresolved issues. We will continue to work with BHP to resolve the remaining air permitting issues in a timely fashion.

A. Cabrillo Port Air Permitting Background

BHP is proposing to construct Cabrillo Port, which will consist of a floating storage and regasification unit ("FSRU") connected to a new subsea pipeline that will come ashore at Ormond Beach, near Oxnard. This facility would be located in the Pacific Ocean, approximately 14 miles offshore of Ventura County, California, between the cities of Oxnard and Port Hueneme. This proposed FSRU facility is a deepwater port, regulated under the DPA. BHP submitted an application to the Coast Guard for a deepwater port license, and an application to EPA for necessary air permits.

On December 31, 2003, BHP submitted a PSD application. On January 30, 2004, EPA informed BHP that the air permit application was administratively complete for prevention of significant deterioration ("PSD") purposes, but that we might need clarifying information on one

or more parts of the application. That letter highlighted one major area where further information might be required, as it stated that we were looking at the applicability of Ventura District new source review (“NSR”) rules to this project, and that we would inform BHP of our determinations concerning NSR at a later time.

In an April 5, 2004 letter, EPA informed BHP that we had determined that the Ventura District NSR requirements applied, and in particular that the offset requirements of the Ventura District NSR Rule 26 applied. In addition to being a local requirement, Rule 26 has been approved by EPA into the Ventura District portion of the California State Implementation Plan (“SIP”). We requested from BHP an analysis of offset requirements in accordance with Rule 26. In its April 5 letter, EPA applied the DPA. EPA did not apply the air rules for facilities governed by the OCSLA, which can be found at 40 C.F.R. Part 55. In determining the applicable adjacent coastal state rules, we applied Section 1502 of the DPA. After determining that the Ventura District rules applied, we were confronted with issues which had not yet arisen in other air permits for deepwater ports.¹ Rule 26 requires offsets, and therefore we conducted a further analysis. In that analysis, we looked to Section 328 of the Clean Air Act to compare the extent to which application of the offset requirement of the Ventura NSR rule would be consistent with how the Clean Air Act treats other sources on the outer continental shelf located in the same area, but we agree that Section 328 is not directly applicable to deepwater ports.

On May 20, 2004, we met with representatives from BHP and BHP’s consultant, Entrix, with the Coast Guard participating in the meeting via conference call. The May 20th meeting focused primarily on the applicability of the District NSR rule to this proposed deepwater port. We also discussed coordinating the air permit with the deepwater port license time line. EPA explained that we must determine how to apply District Rule 26 in a manner which is consistent with the Deepwater Port Act and that we were still examining the question of what marine vessel emissions, if any, are attributed to the source and require offsets under Rule 26 and whether such attribution would be consistent with the Deepwater Port Act. At the May 20, 2004 meeting, we learned that BHP does not agree with our determination that Rule 26 applies and that offsets are required.

¹EPA has also been permitting LNG deepwater port facilities in the Gulf of Mexico. EPA Region 6 has issued a final permit for the Port Pelican deepwater port facility, to be located 37 miles offshore of Vermilion Parish, Louisiana. EPA Region 6 has also issued a permit for the El Paso Energy Bridge facility to be located approximately 116 miles off the coast of Louisiana. Louisiana is not divided into Air Pollution Control Districts which each adopt air pollution control regulations (as is the case in California), and the relevant onshore areas are attainment for these projects. In determining the applicable requirements for the air permits for these deepwater ports, EPA Region 6 looked to the Deepwater Port Act and applied both Clean Air Act Title I and Louisiana SIP rules approved under 40 C.F.R. Part 51.

During the above time period, EPA and the District were informally discussing this project and the application of District regulations. In a letter dated May 27, 2004, we requested that the District provide to us its written interpretation of how the applicable District Rules attribute vessel emissions to a stationary source. In a letter dated June 10, 2004, we informed the Coast Guard that EPA considers BHP's December 2003 application incomplete for the purposes of meeting the Ventura NSR requirements concerning offsets of air emissions, and we asked the Coast Guard to not restart the time line for processing the license until BHP has provided EPA with an analysis of how the project would meet the offset requirements of District Rule 26.² In a letter dated June 18, 2004, the District provided to EPA their interpretation of how the offset requirements of Rule 26 are applied.

B. When Enacting the Deepwater Port Act, Congress Understood The Role of State Air Quality Laws, and That The Clean Air Act Incorporates and Relies upon State Regulations

Hollister & Brace cite section 1518(b) of the DPA, Rodrigue v. Aetna Cas. & Sur. Co (1969) 395 U.S. 352, and argue that when Congress enacted the DPA in 1974³ Congress intended to mirror section 1333 of OCSLA. Hollister & Brace conclude that if existing federal law or regulations cover a particular subject matter, then no state law applies. EPA agrees that state law does not apply to a deepwater port under section 1518(b) of the DPA if federal law has preempted the state law or if state law is otherwise inconsistent with federal law. However, rules approved into the SIP are more than simply consistent with the Clean Air Act: It is well-established that once a SIP is approved by EPA, it becomes federal law.⁴ We also believe that requiring offsets in this case is not inconsistent with the Clean Air Act or the Deepwater Port Act.

When Congress enacted the OCSLA in 1953 (67 Stat. 462), the Clean Air Act did not yet exist, but Congress was concerned about worker safety and gaps in federal law in areas

²In a letter to BHP dated April 6, 2004, the Coast Guard suspended the time line for processing the license in order to obtain additional information concerning the onshore pipeline.

³ The Deepwater Port Act was enacted Jan. 3, 1975. See P.L. 93-627, 88 Stat. 2127.

⁴ United States v. General Motors Corp., 876 F.2d 1060, 1063 (1st Cir. 1989), *aff'd*, 496 U.S. 530, 110 L. Ed. 2d 480, 110 S. Ct. 2528 (1990). See also Trustees for Alaska v. Fink, 17 F.3d 1209, 1210 n.3 (9th Cir. 1994) ("Having 'the force and effect of federal law,' the EPA-approved and promulgated Alaska SIP is enforceable in federal courts.")(quoting Union Electric Co. v. E.P.A., 515 F.2d 206, 211 & n.17 (8th Cir. 1975), *aff'd*, 427 U.S. 246, 49 L. Ed. 2d 474, 96 S. Ct. 2518 (1976)).

traditionally left to state jurisdiction.⁵ In Rodrigue v. Aetna Cas. & Sur. Co 395 U.S. 352 (1969), the Supreme Court analyzed section 1333 of the OCSLA, and held that the Death on the High Seas Act was inapplicable to artificial island drilling rigs, and as a result reversed lower court decisions which had found state law inapplicable. The Court found that Congress adopted the principle that federal law should prevail, and that state law should be applied only as federal law and then only when no inconsistent federal law applied. Rodrigue, 395 U.S. at 358. The Court found that the legislative history of the OCSLA made it clear that these structures were to be treated as islands or as federal enclaves within a landlocked state, not as vessels. Rodrigue, 395 U.S. at 361. The court stated that there was no obstacle to the application of state law by incorporation as federal law through the OCSLA. Rodrigue, 395 U.S. at 366. When Congress enacted the DPA in January, 1975, Congress understood how the Supreme Court had interpreted the OCSLA, and the conclusion that state law could be incorporated as federal law and applied to sources on the outer continental shelf.

In enacting the DPA, Congress also knew the federal structure of the Clean Air Act. Since its inception in 1955, the Clean Air Act has been designed to rely heavily upon state laws and regulations.⁶ The CAA does *not* preempt state authority to regulate stationary sources of air pollution. The modern CAA first took shape in 1970, when Congress expanded federal responsibilities.⁷ Despite this expanded federal role, state regulation remained a key component of the Act. Section 107 states that each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. See 42 U.S.C. §7407(a).

In enacting the DPA, Congress also knew that states might enact state plan provisions which imposed requirements on new sources for purposes of the Clean Air Act. Section 110 of the CAA requires that each state adopt a plan which provides for the implementation, maintenance, and enforcement of the national ambient air quality standards (the state

⁵The OCSLA specifically cites the Longshoremen's and Harbor Workers' Compensation Act, the National Labor Relations Act. See subsections (b) and (c) of OCSLA section 4, 43 U.S.C. § 1333(1)(b) and (c) (2004). Congress was not so specific in the Deepwater Port Act. Cf. 33 U.S.C. § 1518.

⁶The initial Clean Air Act merely authorized the Surgeon General to conduct investigations, surveys, studies and research on air pollution and to make the results available to state and local government air pollution control agencies. 69 Stat. 322.

⁷The 1970 Act authorized the EPA Administrator to issue air quality criteria for air pollutants and information on air pollution control techniques (Section 108); establish national primary and secondary ambient air quality standards (Section 109); publish standards of performance for new stationary sources (Section 111); and publish national emissions standards for hazardous air pollutants (Section 112). The 1970 Act also contained provisions for federal enforcement (Section 113) and citizen suits (Section 304); as well as authority for EPA to obtain information, require recordkeeping, and conduct inspections (Section 114).

implementation plan, or “SIP”). Section 110 of the 1970 Act stated that the EPA Administrator was to approve a SIP if he determined, amongst other criteria, that the plan included a procedure for review (prior to construction or modification) of the location of new sources to which a standard of performance would apply.⁸ See Section 110(a)(2)(D) of the Clean Air Act amended Dec. 31, 1970, P.L. 91-604, 84 Stat. 1679. This procedure was to provide for adequate authority to prevent the construction or modification of any new source which the State determined would prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard. It also required that the owner or operator submit such information as necessary for the State to make the determination. See Section 110(a)(4) of the Clean Air Act amended Dec. 31, 1970, P.L. 91-604, 84 Stat. 1679.

Finally, Congress knew how federal enclaves within a landlocked state were treated for purposes of the Clean Air Act. The 1970 Act contained Section 118, which stated at that time that each department, agency, and instrumentality of the Federal government having jurisdiction over any property or facility shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. See Section 118 of the Clean Air Act as amended Dec. 31, 1970, P.L. 91-604, 84 Stat. 1679.

Against this backdrop, Congress enacted the DPA. The relevant provisions of the DPA state that a deepwater port shall be considered a “new source” for purposes of the CAA, and that conformity with all applicable provisions of the CAA is a condition of issuance of a deepwater port license. See 33 U.S.C. §§ 1502(9) and 1503(c)(6). At that time, applicable provisions for new sources included Sections 110, 111, 112 and 116 of the Clean Air Act.⁹ Section 1518(a) of the DPA extends the Constitution and laws of the United States “to deepwater ports . . . and to activities connected, associated, or potentially interfering with the use or operation of any such port, in the same manner as if such port were an area of exclusive Federal jurisdiction located within a State.” Section 118 of the Clean Air Act speaks directly to the question of how an area of exclusive Federal jurisdiction located within a State is to be treated for purposes of the Clean Air Act: the state implementation plan is to apply. Section 1518(b) of the DPA states that the “law of the nearest adjacent coastal State . . . is declared to be the law of the United States, and shall apply to any deepwater port . . . to the extent applicable and not inconsistent with any provision or regulation” under the DPA or other Federal laws and regulations. Section 110 of the

⁸Section 110 is now much broader in scope. The Clean Air Act was significantly amended in 1977 and 1990 to require that states adopt measures for the achievement or maintenance of national ambient air quality standards, including measures which require offsets from new sources. See 42 U.S.C. § 7503 and § 7410(a)(2)(C) and (D).

⁹The current Clean Air Act applicable provisions for new sources also include the offset and other requirements specified in Sections 172 and 173, and the preconstruction requirements for attainment areas in Sections 160 through 169b.

Clean Air Act provides a framework for determining whether state law is consistent with the Clean Air Act and approvable as a SIP rule. When state law is consistent with the Clean Air Act and the DPA, then Section 1518(b) of the DPA “federalizes” these state laws by providing that all such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States.

The structure of the Clean Air Act at the time the DPA was enacted supports our conclusion that the DPA did not intend to preempt local air quality laws which are consistent with the Clean Air Act, and in fact incorporated into the applicable SIP. The DPA is written so that the law which is currently in effect is the law which is to be applied. See 33 U.S.C. §§ 1518(a)(1) and 1518(b). The Clean Air Act has been significantly amended since 1975, as our nation has continued to struggle with the difficult task of achieving and maintaining national ambient air quality standards. As a result, state implementation plans have also been significantly amended. We are applying the current version of the Clean Air Act and the current District rules as approved by EPA into the SIP. We agree that local air regulations which are not part of a SIP might be differently treated under the DPA and the OCSLA. However, we do not address that issue here since Rule 26 is approved into the SIP, and application of Rule 26 is consistent with the Clean Air Act.

C. Marine Vessel Emissions: In determining offsets required for the stationary source, emissions from marine vessels which load or unload at the Cabrillo Port shall be included only to the extent Section 26.2.B of Rule 26 requires such marine vessel emissions to be included and to the extent that such a requirement is consistent with both the Clean Air Act and the Deepwater Port Act.

We agree with the conclusion that under federal law, California’s territorial boundaries extend only three nautical miles from the coast and include a three mile band around the islands off the coast but exclude waters between the islands and the coast of California. See United States v. California, (1965) 381 U.S. 139 at 170-172. We therefore agree that the only combustion emissions in waters within the territorial boundaries of California would be from assist tug, crew and supply boats, while cargo vessels will most likely remain outside of the territorial boundaries of California.

We disagree with other arguments made by Hollister & Brace concerning treatment of vessel emissions, but we are still carefully considering this issue. First, there is an important distinction between direct regulation of marine vessels (such as regulation of the emissions from marine engines) versus accounting for the vessel emissions in the potential to emit of a stationary source, and then including the vessel emissions in offset calculations and impact analysis for that stationary source. EPA agrees that direct regulation as independent stationary sources of the marine vessels’ internal combustion engines used for transportation would be inconsistent with the Clean Air Act.

We are not proposing to directly regulate marine vessel engines. We are only considering

the extent to which marine vessel emissions are to be included in the potential to emit of the stationary source, and thus the extent to which vessel emissions are included in offset calculations and the impact analysis for the deepwater port. To clarify the extent to which offsets might be required for marine vessel emissions, we have asked Ventura District to provide us with an interpretation of Rule 26. Finally, we have considered whether Rule 26 is consistent with the DPA. To shed light on how the language of the DPA should be interpreted, we have also looked at Congressional intent in passing the DPA, and as a result we are also looking at how vessel emissions would be treated in an onshore LNG facility located in a similar area within the state of California, the proposed Long Beach LNG facility. Based on this review, as described in detail below, we conclude that Rule 26 as interpreted by Ventura District is consistent with the CAA and the DPA.

District Interpretation of Ventura Rule 26

In a letter dated May 27, 2004, we requested that the District provide to us its interpretation of how the applicable District Rules attribute vessel emissions to a stationary source. In a letter dated June 18, 2004, the District provided to EPA its interpretation of how the offset requirements of Rule 26 are applied. The District stated that the following vessel emissions are *not* included in the emissions which are counted when calculating offsets:

- hoteling emissions while the vessel is docked at the FSRU.
- combustion emissions (which include both propulsion and hoteling emissions), from supply boats or LNG tankers while outside District waters, (i.e., outside 3 miles from the shoreline)

In our permitting action, we will require no offsets for the above-listed vessel emissions.

The District stated that the following vessel emissions *are* included in the emissions which are counted when calculating offsets:

- Emissions resulting from loading and unloading of LNG tankers or supply boats at the stationary source/Cabrillo Port.
- Combustion emissions from the supply boats (or LNG tankers) while operating *in* District waters (i.e., within 3 miles of the shoreline).
- Fugitive emissions or reactive organic compound emissions that are displaced into the atmosphere from the supply boats or LNG tankers while the vessel is (1) docked at the stationary source/floating storage and regasification unit or (2) operating in California coastal waters adjacent to the District. (Example: if oil tankers open up the lids to their oil tanks, the air which is “burped” out as a result would include fugitive emissions or reactive organic compound emissions that would be displaced into the atmosphere and subject to offsets.)

In preparing an offset package, BHP should include offsets for the above-listed vessel emissions.

Whether Rule 26 is consistent with the Clean Air Act.

EPA's April 5, 2004, letter found Ventura District rules, including Rule 26, applicable to the Cabrillo Port. Rule 26 has been approved by EPA into the Ventura District portion of the California SIP, as the applicable NSR rule. Rule 26 is consistent with the provisions of the Clean Air Act.

Hollister & Brace cite to NRDC v. USEPA, 725 F.2d 761 (D.C. Cir. 1984) to argue that EPA cannot require consideration of the transit emissions from marine vessels when issuing permits for associated onshore facilities, as the effect of this decision is that marine vessel emissions are not subject to mandatory regulation through indirect source review under the CAA. Hollister & Brace at page 7. We agree that marine vessel transit emissions are not subject to mandatory regulation through indirect source review mandated to be included in a SIP or FIP by EPA.¹⁰ However, nothing in this court decision bars EPA from implementing and enforcing a SIP rule in which a state or local air district requires offsets for some of the marine vessel emissions related to a port.

Hollister & Brace argue that the CAA precludes EPA involvement in indirect source review. Hollister & Brace at page 7. The CAA's requirement is that EPA not **mandate** inclusion of an indirect source review program in a SIP or include it in a Federal Implementation Plan (FIP), except as authorized by Section 110(a)(5)(B). CAA Section 110(a)(5)(A), 42 U.S.C. § 7410. However, the CAA states "Any State may include in a State implementation plan...any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan." CAA Section 110(a)(5)(A)(i), 42 U.S.C. § 7410. EPA's review of the port for permitting purposes is not equivalent to mandating inclusion of an indirect source review program into a SIP (or including it in a federal implementation plan). In this case, we are applying an existing SIP rule, Rule 26, and the CAA states that EPA may approve and enforce indirect source review programs which the State chooses to adopt and submit.

Hollister & Brace cite to Santa Barbara County APCD v USEPA, 32 F.3d 1179 (D.C. Cir. 1994), to bolster their argument that emissions from vessels involved in transporting cargo, supplies or personnel to or from a deepwater port facility are excluded from calculations of emissions from the stationary source. Hollister & Brace at page 6 and 7. Perhaps due to the brevity of the court opinion, Hollister & Brace mischaracterized this decision. When EPA

¹⁰Except as authorized by 110(a)(5)(B), which authorizes EPA to promulgate, implement and enforce regulations for indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources. Thus, EPA does have certain authority to promulgate regulations for indirect sources. 42 U.S.C. § 7410(a)(5)(B).

promulgated its OCS regulations in 1991, section 55.2 of the OCS final rule provided that the only marine vessels which were to be *independently* considered “OCS sources” -- and hence subject to *direct* regulation under the final rule -- were drill ships. See 56 Fed. Reg. 63774 at 63777. However, emissions from marine vessels servicing or associated with an OCS source, including emissions while at the OCS source or en route to or from the OCS source and within 25 miles of the OCS source were included in the definition of “potential to emit” of an OCS source. Id. As a result, offsets were required for marine vessel emissions when the vessel was en route to or from the OCS source and within 25 miles of the OCS source. Id. See also 57 Fed. Reg. 40792 at 4093-94. Santa Barbara APCD was arguing that EPA had authority to *directly* regulate vessels which were on the outer continental shelf as OCS sources, and that the OCS rule was not sufficient because it only provided for offsets, but not emission controls, to mitigate in-transit vessel air pollution. See Brief of Petitioner Santa Barbara APCD (filed December 22, 1993) at page 29. EPA was arguing that Congress intended that emissions from marine vessels in transit be included in the emissions from the associated OCS source. See Brief for the Respondents filed November 22, 1993, at pages 14-27. The court agreed with EPA that marine vessels merely traveling over the OCS were not OCS sources. Santa Barbara APCD, 32 F.3d at 1181. The court did not address EPA’s interpretation that vessel emissions be included in the calculation of OCS source offsets, as that issue was not raised by petitioners. A full understanding of the Santa Barbara APCD case also shows that there is a difference between including vessel emissions when calculating offsets required from a stationary source and directly regulating the vessel as an independent source.

Santa Barbara APCD was also disputing EPA’s creation of three zones for the purpose of calculating the necessary amount of offsets. EPA declined to implement the Santa Barbara offset standards because straight application of the distance penalties in the Santa Barbara rule would create a disincentive for an OCS source to obtain offsets onshore. As Hollister & Brace point out, the court struck down this attempt by EPA to soften the impact of applying an onshore offset rule to a source located on the OCS. The court stated:

The statute does not speak of affording similar regulatory treatment; instead, it explicitly calls on the agency to promulgate the same offset “requirements... as would be applicable if the source were located in the corresponding onshore area.”...While Congress’s intent may have been misguided, we think it was clear, and thus the agency is bound to give it effect.”

Id., 32 F.3d at 1182. The court vacated EPA’s regulations which allowed offsets from zones 2 and 3 to be obtained without distance penalties. When Congress says to apply the laws of the onshore area to a stationary source on the OCS, EPA cannot change the offset rules in a way that deviates from the relevant statutory language. It is for precisely this reason that we have attempted in the case of this proposed deepwater port to gather the necessary information to determine how the relevant statutory language of the DPA and CAA should be applied in this case.

California Treatment of Onshore LNG Port facility

Ventura's interpretation of Rule 26 does not impose substantially greater burdens on an offshore facility than on a similarly situated onshore facility. An application for an air permit has been submitted to South Coast Air Quality Management District ("South Coast") for a LNG port facility at Long Beach (the proposed "Long Beach facility"). The Long Beach facility is not a deepwater port, but an onshore facility. The rule being applied to the Long Beach facility is different than Ventura Rule 26 because the California SIP has different rules applicable in South Coast. The South Coast NSR Regulation 13, at rule at 1306(g), **does** have a comparable (but not identical) requirement to include as emissions from the stationary source certain emissions from marine vessels, although the mechanism for this requirement is different. The South Coast Rule does not define the facility to include emissions from associated vessels. See South Coast Rule 1302(m). Vessels are clearly mobile sources. See South Coast Rule 1302(q). However, South Coast Rule 1306(g) states "The following mobile source emission increases or decreases directly associated with the subject sources shall be accumulated: (1) Emissions from in-plant vehicles; and (2) All emissions from ships during the loading or unloading of cargo and while at berth where the cargo is loaded or unloaded; and (3) Nonpropulsion ship emissions within Coastal Waters under District jurisdiction." This South Coast rule is being applied to the proposed Long Beach facility. The offset analysis done for the Long Beach facility includes emissions from water heaters, hoteling, and non-propulsion emissions of associated shipping. South Coast excludes all emissions from ships arising from propulsion of the ship.

Because EPA has made a determination that the Ventura District rules apply, the South Coast rule does not apply to the proposed Cabrillo port. However, the intent of Congress in enacting the DPA was to allow state environmental laws which applied to onshore facilities to also apply to offshore facilities. See Senate Report 93-1217 *reprinted in* 1974 U.S.C.C.A.N. 7529, 7584.¹¹ In considering whether requiring the offsets of Rule 26 would be consistent with the DPA, we have considered the treatment of the Long Beach facility. There are differences in how the South Coast and Ventura Rules treat vessel emissions when calculating the required offsets, but Ventura's interpretation of Rule 26 does not impose substantially greater burdens on an offshore facility than on a similarly situated onshore facility.

Whether Rule 26 is consistent with the DPA.

Having concluded that Rule 26 is consistent with the Clean Air Act, we turn to whether Rule 26 is consistent with the Deepwater Port Act. Hollister & Brace argue that the DPA does not require or permit the attribution to Cabrillo Port of emissions from marine vessels when those vessels are in transit to or from the port or when such vessels are "hoteling." We believe that this

¹¹In the discussion of Section 19, relationship to other laws, Senate Report 93-1217 states that the provision applying the laws of the nearest adjacent coastal state "also prevents the Deepwater Port Act from relieving, exempting or immunizing any person from requirements imposed by state or local law or regulation. In addition, States are not precluded from imposing more stringent environmental or safety regulations."

argument is largely moot in this case, as Rule 26 (as interpreted by Ventura District) does not require offsets for hoteling emissions or combustion emissions (which include both propulsion and hoteling emissions) from vessels which are further than three miles from shore.

Rule 26 does require offsets for emissions resulting from loading and unloading of vessels at the stationary source, and combustion emissions from vessels while such vessels are operating *in* District waters (i.e., within 3 miles of the shoreline). Rule 26 also requires offsets for fugitive emissions or reactive organic compound emissions that are displaced into the atmosphere from vessels whether the vessel is docked at the FSRU or operating in California coastal waters adjacent to the District. We do not believe that these requirements conflict with any part of the DPA.

D. Attainment/Non-Attainment Classification of OCS

Hollister & Brace argue that Cabrillo Port should not be treated as if it were located in a non-attainment area, stating that a PSD area is one designated pursuant to CAA § 107 and 40 CFR Part 81 as either “attainment” or “unclassifiable” for a criteria pollutant. Hollister & Brace state that the FSRU is situated in an offshore area that has not been designated as “non-attainment”. However, the offshore area where the FSRU will be located has also not been designated as “attainment” or “unclassifiable” at 40 CFR Part 81. All parts of the state of California have been put into attainment, nonattainment, or unclassifiable areas under CAA Section 107(d). Ventura County excluding the Channel Islands of Anacapa and San Nicolas Islands is classified as a severe nonattainment area for the ozone one-hour standard, and a moderate nonattainment area for the ozone 8-hour standard. All of the Channel Islands, including Anacapa and San Nicolas, are designated as unclassifiable/attainment for the ozone 1-hour and 8-hour standards. Ventura County and all of the Channel Islands are designated as attainment, unclassifiable, or better than national standards for SO₂, carbon monoxide, PM-10, and NO₂. 40 C.F.R. § 81.305. To date, EPA has not promulgated separate area designations for portions of the outer continental shelf, because existing outer continental shelf sources are covered by the OCS Air Regulations. The DPA requires that EPA apply the law of the onshore area, to the extent consistent with the DPA and other federal law. Depending upon the facts of the situation, EPA might determine that it would be inconsistent with the CAA, or not “applicable” within the meaning of section 1518 of the DPA, to apply the nonattainment status of the onshore area to a deepwater port at a greater distance from shore than the proposed port. In this case, however, treating the source as if it were located within the onshore ozone nonattainment area is not inconsistent with the Clean Air Act.¹²

¹²EPA has included in the EPA-approved California SIP emissions inventories which include emissions on the outer continental shelf. See 62 Fed. Reg. 1150, 1173 (Ventura District 1990 base year inventory included OCS emissions, despite Ventura District argument that OCS emissions were outside the District's nonattainment area, because CARB had not requested exclusion of OCS emissions, and the totals were consistent with the California SIP submittal).

E. Federal Conformity Determination

Hollister & Brace also raise the issue of the federal conformity rule (40 C.F.R. Part 51, subpart W). The purpose of the federal conformity rule is to implement CAA section 176(c) (42 U.S.C. § 7506(c)), which requires that all Federal actions conform to an applicable implementation plan. 58 Fed. Reg. 63214. In this case, the applicable implementation plan would be the Ventura District portion of the California SIP, and Ventura District Rule 220 simply adopts by reference the provisions of 40 C.F.R. Part 51, Subpart W.

We agree that no conformity determination is required for the portion of the project which is covered by a preconstruction permit issued by EPA. EPA would be issuing a preconstruction permit for the FSRU, to be located outside of state territorial waters. However, the portion of the project which is covered by a preconstruction permit issued by EPA is not the entire Cabrillo Port project. A joint NEPA and CEQA (California Environmental Quality Analysis) is being prepared for this project, and both NEPA and CEQA will address conformity.

We would be happy to discuss the issues which might be raised by this conformity analysis further with BHP and the Coast Guard (as the Coast Guard has the lead responsibility to conduct the conformity analysis).

F. Timeline, Resolution

We will continue to work with BHP to clarify the unresolved issues concerning these

There are also concerns that emissions on the outer continental shelf can be transported and contribute to nonattainment onshore. For example, in the context of analyzing *direct* regulation of new marine diesel engines used primarily for propulsion power on ocean-going marine vessels such as container ships, tankers, bulk carriers, and cruise ships with per-cylinder displacement of 30 liters or more that are installed on vessels flagged or registered in the United States ("Category 3" marine diesel engines), emission inventories were prepared which included emissions from vessel traffic within 25 nautical miles of port areas ("in-port emissions") and emissions from vessel traffic outside of port areas but within 175 miles of the coastline ("non-port emissions"). See "The Final Regulatory Support Document: Control of Emissions from New Marine Compression-Ignition Engines at or Above 30 Liters per Cylinder" (EPA 420-R-03-004 January 2003). This report included non-port emissions within 175 miles of the coastline in the inventory estimates on the assumption that emission transport could bring these emissions on to shore and affect U.S. ambient air quality. Although 175 miles may be considered a conservative assumption, the authors considered studies of the outer continental shelf area off the coast of Southern California which concluded that emissions within 60 nautical miles of shore could make it back to the coast or that the region of "coastal influence" was perhaps 30 nautical miles. *Id.* at 2-2. Cabrillo Port would be approximately 14 miles offshore.

offset requirements. Based upon our preliminary analysis, and the clarification provided by Ventura District, we suggest that BHP provide an offset package which includes offsets for emissions from the FSRU, including emissions resulting from loading and unloading of vessels at the stationary source, and combustion emissions from vessels while such vessels are operating *in* District waters (i.e., within 3 miles of the shoreline). The offset package should also include offsets for fugitive emissions or reactive organic compound emissions that are displaced into the atmosphere from vessels whether the vessel is docked at the FSRU or operating in California coastal waters adjacent to the District (to the extent such emissions could occur with LNG tankers and the other vessels associated with the Cabrillo Port). We look forward to receiving information concerning offsets from BHP so that we can move forward with the air permitting process.

EPA Region 9 is also ready and willing to work with you, and the relevant state authorities, to utilize existing flexibility in the applicable law and regulations to allow BHP to be innovative in obtaining the offsets which are required for the project.

Timing: Once we receive a commitment from BHP to prepare an offset package, BHP and EPA can work with the Coast Guard to ensure that the NEPA (and CEQA) analysis can go forward in a way that ensures that adequate information on offsets is available in that analysis. We will need the offset package itself to proceed with preparation of a draft permit. Upon receipt of an adequate and complete offset package, the air permits office will need about two months to prepare a permit (Authority to Construct). The draft permit would then be published, and there is a thirty day period for public comment. After the close of the public comment period, Region 9 air permits office will respond to comments and finalize the permit. When a permit is issued and uncontested, it become effective in thirty days. However, permits can also be appealed to the Environmental Appeals Board (EAB) within EPA. The EAB would follow its procedures for determining if any of the issues raised require review or changes to the permit.

Title V permit timing: In our May 20 meeting, we discussed the timing of EPA issuing a title V operating permit. As we discussed, an operating permit can be issued at the same time as a preconstruction permit, or separately. Because operating permits have annual requirements (such as payment of fees and certification of compliance) which might not make sense if there is a significant lag time between issuance of a preconstruction permit and final construction and operation of a facility, the operating permit application is often submitted later and the operating permit issued after operations have begun. Operating permits contain the requirements found in the preconstruction permit (and any other applicable requirements and title V requirements such as monitoring, recordkeeping and reporting requirements), but operating permits must be renewed every five years. Region 9 has been proceeding with the understanding that the air permit application is a preconstruction permit, and that an operating permit will be issued separately. If BHP would prefer that EPA issue an operating permit at the same time that we issue a preconstruction permit, BHP should clearly state that desire to us, and submit an operating permit application. If we do not receive an operating permit application, we shall proceed with our original plan to issue the preconstruction permit initially, and expect BHP to

apply for an operating permit pursuant to the timeframe set forth at 42 U.S.C. §7661b(c) and 40 C.F.R. § 71.5(a)(1).

CONCLUSION

Based on the above reasons, we conclude that Ventura District Rule 26 applies. We are requesting that you supplement the December 2003 air permit application to include the requirements of District rules, specifically NSR Rule 26. Thank you for your patience in this matter. These difficult issues of first impression require time to gather and analyze the relevant information, including the letter from Hollister & Brace in which BHP expresses its views, and time for EPA to coordinate with various affected programs in EPA and other federal agencies. I assure you that EPA Region 9 will give fair and timely consideration to BHP's permit applications. If you have any questions concerning this letter, or the review of your application, please call Nahid Zoueshtiagh at (415) 972-3978 or Margaret Alkon at (415) 972-3890.

Sincerely,

Gerardo C. Rios
Chief, Permits Office
Air Division

Distribution via email:

Mark Prescott, US Coast Guard
Frank Esposito, US Coast Guard
Francis Mardula, MARAD
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Kerby Zozula, Ventura County APCD
Robert Kwong, Ventura APCD
Mohsen Nazemi, South Coast AQMD
Ron Tan, Santa Barbara APCD
Kevin Wright, Entrix, Inc.
Tom Umenhofer, Entrix, Inc.
Jeff Cohen, White House Energy Task Force